Office-Supreme Court, U.S.
FILED
OCT 1 1965
JOHN F. DAVIS, CLERK

No. 287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER

GEORGE F. CALLAGHAN
105 W. Adams Street
Chicago, Illinois 60603
Attorney for Petitioner

JULIUS LUCIUS ECHELES and
MELVIN B. LEWIS
30 North LaSalle Street
Chicago, Illinois
Of Counsel

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

	PAGE
1. The separation of the jury.	2
2. The improper use of the grand jury.	3
3. The evidence of coercion.	4
Conclusion	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 287

MEDO CALZAVARA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF FOR PETITIONER

May it please the Court:

Detailed refutation of the government's contentions would require a brief of inappropriate length. We will refute the government's generalities with neither tedious details nor unenlightening generalities of our own. Rather, we will demonstrate that the government has proceeded from inapposite premises.

As we read the government's brief, it is not contended that the questions we have presented are inappropriate for this court's consideration. Rather; the government contends that the points are not properly preserved for review.

The government is quite mistaken.

1. The separation of the jury.

The government contends that this petitioner did not object to the jury separation. It is conceded that the objection was made on behalf of a co-defendant; but the government claims to "find nothing in the record suggesting that objection by one counsel would be treated as objection by all." (Br. 8).

But the record fairly screams that throughout the trial objection by one defendant was treated as objection by all. At the conclusion of the government's case, when defense motions were in order, the court stated: "All right, gentlemen. I take it any motions made by one counsel stands for all counsel unless disclaimed *as with respect to the objections to evidence.*" (Tr. of Pr. 1397).

Thus the evidentiary procedure of an objection by one being treated as an objection by all, was expressly extended to the motions outside the presence of the jury. And even before that time, it was clear that an objection by one was an objection by all, not merely in the presence of the jury, but as to the total record. At an earlier stage, when one counsel had moved for mistrial (Tr. 1224), the court expressed its understanding as follows:

"You gentlemen have made motions for a mistrial on behalf of all the defendants, which I will deny." (Tr. 1230). This accorded with the court's desire to reduce the number of rulings. When petitioner's counsel attempted to re-state an objection on one occasion, the court objected: "How many times do I have to rule on it? I have ruled." (Tr. 1187).

It is manifestly unfair to suggest that counsel avoid restatement of objections and then to claim, as the government has done here, that there was no express agreement that each should benefit by the other's objections. But it is not necessary to decide the issue in terms of fairness. The court expressly stated that, "Any motions made by one counsel stands for all counsel unless disclaimed." (Tr. 1397). That is quite clear enough. And we regard it as telling, that the government feels free to make the point in that factual posture.

The government's contention that the defendants agreed that the jury should separate, stands on no better footing. The court had announced, unequivocally, that it intended to release the jury to their homes, notwithstanding the defense objection (G. Br. 6). The colloquy on which the government relies (G. Br. 6, 7) shows nothing more than that when the court outlined the *details* of the separation procedure, that defense counsel first asked for a chance to confer, but then immediately stated that no conference was necessary in order to object to a part of the procedure. This is a far cry from agreeing to the remainder of the procedure. And this occurred *after* the court had clearly announced its intention to release the jury over defense objection. As the court had earlier observed, "How many times do I have to rule on it? I have ruled." (Tr. 1187).

2. The improper use of the grand jury.

(a) The government takes comfort in the fact that the defendant did not testify before the second grand jury. It was not necessary that he do so, in order that his rights be invaded. The agents who did in fact testify, were fully familiar with what had happened before. And it is manifestly unfair that the government attempts to tell

your Honors (Br. 11, Fn. 6) that only competent evidence was used; for, having withheld the information in the trial court, the government is certainly in no position to state now, as it does, that there is no reason for its secretiveness.

Of course, as the government contends, the defendant does not know whether his prior testimony was used in any manner before the subsequent Illinois grand jury (Br. 11). That is the very thing upon which petitioner predicates his claim of constitutional deprivation.

b) The promise of lenity.

The promise was in fact made. To rationalize, as the government does, that the FBI stated that it had no power to do what it had, is a mere play on words.

3. The evidence of coercion.

a. The government contends that the court possessed "discretion" to exclude the defense testimony. Obviously, if the testimony was competent, the court had no "discretion" to keep it from the jury. And the government does not contend that it was incompetent.

Rather, the government states that the testimony would not have established a defense of coercion. At the same time, the government takes comfort in the fact that the jury was instructed on that defense theory. The issue was properly presented or it was not; but the government cannot have it both ways.

b. The erroneous use of grand jury testimony.

The government contends that it was entitled to use prior grand jury testimony to impeach petitioner. But that begs the issue. The government was not entitled to use *illegally obtained* evidence for any purpose.

CONCLUSION.

For the reasons stated in our original petition, we urge that this is a proper case to merit this court's attention, and pray that a writ of certiorari be granted.

Respectfully submitted

GEORGE F. CALLAGHAN
Attorney for Petitioner

JULIUS LUCIUS ECHELES and
MELVIN B. LEWIS
Of Counsel